No. 10-975

APR 23 2011

In The
Supreme Court of the United States

OCTOBER TERM 2010

SUZANNE BONDS

Petitioner,

vs.

143 NENUE HOLDINGS, LLC and
AMERIQUEST MORTGAGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

REPLY BRIEF

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A. Introduction

This Reply Brief is being submitted pursuant to Supreme Court Rule 15.6 in advance of this Court's April 29, 2011 Conference, in the steadfast belief that there is no issue of greater significance before this Court affecting the daily lives of virtually every American citizen today.

The historical ignoring of the constitutionality of mortgage foreclosures in the United States has now pushed this Nation's economy, as well as the economies of the entire world, to the very brink of financial collapse, while still escaping oversight by the federal judiciary as a result frankly of a lack of leadership by this Court.

The facts of this case, in contrast to the desperate attempt in the Opposition Brief of Respondent Ameriquest Mortgage Company, well-known to be one of the worst predatory lenders in the history of the United States, to distort the record below, present this Court with the clearest set of operative facts imaginable, inviting if not compelling this Court's attention after more than 200 years of silence and lack of constitutional oversight.

B. Points in Reply

The Opposition Brief presents three new arguments in response to the Petition, neither of which is valid.

1. Petitioner's Constitutional Claims Are Not Moot.

The Opposition Brief, pages 12-13, merely is content to argue in a circle, claiming that because of the *Aames* decision, the subject of this constitutional challenge, since Petitioner did not challenge the transfer of title beforehand, the issue is now supposedly moot.

First, the transfer of title below occurred on May 19, 2004 when Petitioner, living alone, was "not

mentally competent" and in "advanced stages" of "progressive dementia' (Petition, page 4). It was not until almost one month afterwards, on June 17, 2004, that with the assistance of caregivers at her Church trying to look after her that an attorney was retained to assist her.

Second, Petitioner's defenses, in addition to lack of capacity, were failure of her lender to have given her proper notice of default and proper notice of acceleration (all of which are contractually required as preconditions to foreclosure), and violations of the federal Truth-in-Lending Act ("TILA"), yet none of that matters in Hawaii once title is transferred.

Thus the Opposition Brief tries to assume away precisely what is the actual issue in this proceeding:

> Does a State have the power to constitutionally override the terms and conditions of private contractual agreements and common law defenses arising thereunder, as well as well-established Congressional statutory consumer rights and remedies, by passing laws (so interpreted by its highest court) that cancel such protections wily nily while claiming inconsistently not to be state action?

Yet that is exactly what was done below by the Hawaii State Courts.

Furthermore, the claim in the Opposition Brief, page 12, that "Petitioner's injury cannot be redressed by this Court [thus "moot"] because the Sale was completed almost seven years ago and Haw. Rev. Stat. § 501-118 bars any challenge after the entry of the TCT" is similarly a logic chasing its own tail, for not only would, for instance, TILA

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pursuant to the Supremacy Clause trump any such sale as void, but Petitioner would in any event be eligible for an award of substantial damages against her wrongfully foreclosing mortgagee were this Court to grant her Petition and reverse – hardly a textbook definition of "mootness" or "absence of case or controversy."

2. Petitioner's Constitutional Claims Are Not Barred By Res Judicata.

The Opposition Brief, pages 12-16, next asserts that the doctrine of *res judicata*, now known as issue preclusion in Hawaii, blocks the relief requested here, solely because of, according to the Opposition Brief, Petitioner's failure to challenge the constitutionality of Haw. Rev. Stat. § 667-5 in the Special Proceeding."

Once again, the Opposition Brief is completely factually mistaken as to what occurred in that very early Special Proceeding predating the proceedings below.

The attorney quickly brought into the case by Petitioner's Church caregivers, immediately sought the intervention of the First Circuit Court in Honolulu, on June 17, 2004, filing as an "appeal" in "Special Proceeding No. 04-1-0198" a motion to cancel the nonjudicial foreclosure sale, filed mistakenly pursuant to Section 667-35 of the Hawaii Revised Statutes (Hawaii's alternative nonjudicial foreclosure law), when in fact the nonjudicial sale of Petitioner's residence had been conducted pursuant instead to Section 667-5 of the Hawaii Revised Statutes (the so-called old nonjudicial foreclosure law), which does not provide for any appeal whatsoever to any State Court, which case was assigned to the Honorable Richard W. Pollack for decision, all of which prior proceedings the lower court below took judicial notice of.

On July 27, 2004, by Minute Order, and subsequently by formal Order entered on August 18, 2004, Judge Pollack denied Petitioner's motion to cancel the sale, on the basis that:

> [U]nder HRS § 667-35, any appeal or motion under this statute had to be taken within 30 days of April 23, 2004" [the date of the filing of "Mortgagee's Affidavit of Foreclosure under Power of Sale"]. The instant motion was filed on June 17, 2004, well after the expiration of the 30-day period.

Judge Pollack, however, overlooked the fact, as correctly argued by the opposition in that mistaken Special Proceeding, that his Court had no jurisdiction over said so-called "appeal" in the first place and therefore the power only to dismiss rather than deny, since the special proceeding was as a matter of law filed erroneously with him, the Hawaii State Legislature not having authorized such appeals, nor empowered its Circuit Courts to intervene by way of appeal in Section 667-5 nonjudicial foreclosure cases.

There being no jurisdiction over that Special Proceeding, there could be no *res judicata* effect as Judge Pollack had no power to decide anything and could not decide anything, and in fact decided however mistakenly only that he had no jurisdiction, *albeit* mistakenly, on erroneous grounds.

It compounds error, as the Opposition does, to try to fault Petitioner or her replacement counsel here, bound by the requirements of Rule 11, for not appealing Judge Pollack's otherwise erroneous reasoning in the Special Proceeding when he had no jurisdiction to decide anything and did not decide anything by any stretch of advocacy in any way related to any issue in these proceedings.

Moreover, the Hawaii State Appellate Courts below (their opinions are set forth in the Appendix to the Petition), neither considered nor based their decisions upon the doctrine of *res judicata*, but ruled solely and exclusively as a result of the *Aames* decision being challenged here.

3. The Actions Below Were "State Action."

The Opposition Brief, pages 17-23, is forced to argue, incredibly, that the promulgation of a state statute, interpreted and enforced by a state's appellate courts so as to block its trial courts from even considering a borrower's arguments and proof that its lender violated its contractual promises and that its lender violated federal consumer protection laws once title has been transferred, even though the borrower was unaware of the transfer of title and/or had insufficient time and means to object, is not "state action," when without such a state statute a borrower would be able to do so.

Thus, by doing so, the State of Hawaii, contrary to merely enforcing private contractual agreements, is actually overriding private contractual agreements as well as attempting to override the Supremacy Clause by defeating Congressional statutory consumer rights, under the guise of doing the exact opposite, thereby intervening by "state action" in the private common law rights and federal consumer rights of Hawaii borrowers whose real property just happens to be registered in Land Court.

Although not directly essential for these proceedings, but also highlighted in the Petition, is the similar deceitful manner in which Fannie Mae and Freddie Mac, "sponsored" by the Federal Government and armed only with U.S. Treasury money, whose defalcations have now become legendary, have been similarly able to escape needed judicial oversight through the unjustified legal

fiction that their conduct also has not involved "state action."

On the other hand, Fannie Mae and Freddie Mac have together controlled the vast majority of mortgage lending in the United States and the lawyering of even private foreclosure attorneys nationally, to the extent of determining even how much they are allowed to charge and ordering them with express written directives and retention agreements to use only nonjudicial foreclosure remedies in Hawaii.

C. Conclusion

The mortgage crisis in the United States threatens to undue in two years' time what it took this Nation more than 200 years to build -- the wealthiest, the strongest, and the most robust economy in the history of the world.

Now that economy is under unprecedented attack.

Virtually every mounting financial problem facing this Nation today, including unprecedented unemployment, rising inflation, depressed growth, and 13% of this Nation's housing units uninhabited, can be traced back to the collapse of the securitized secondary mortgage market and our archaic foreclosure enforcement processes inherited from 14th and 15th century harsh English common law, no more draconian an example of which is Hawaii's ancient 1874 nonjudicial foreclosures law.

Respectfully submitted,

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April 22, 2011